4

Office - Supreme Court, U.S.
FILED
1952
CHARLES ELMORE CROPLEY
CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1952

CHICAGO AND NORTH WESTERN RAILWAY COMPANY, Appellant, vs. UNITED STATES OF AMERICA, and the INTERSTATE COMMERCE COMMISSION, Appellees.	No. 353

APPELLANT'S BRIEF OPPOSING THE MOTIONS TO AFFIRM.

NYE F. MOREHOUSE,

P. F. GAULT,

EDGAR VANNEMAN,

Attorneys for Appellant.

TWENTIETH CENTURY PRESS, INC., CHICAGO

INDEX.

PAGE

Foreword 1

Appellees' Contentions Respecting the Commission's Power under Section 1(21) Are Based Upon the Fallacious Assumption That There Is But One Industrial District Within the City of Milwaukee..... 2

Upholding the Commission's Order Would Defeat the Purpose of Congress and Would Be Contrary to Leading Decisions of This Court..... 4

The Commission's Lack of Power Cannot Be Cured by Agreement or Acquiescence of the Parties..... 8

Appellees' Attempt to Find a Basis for Commission Action Under Section 3(5) Is Palpably Strained and Fallacious 9

The Lack of Essential Basic Findings Is Emphasized By Appellees' Motion..... 11

The Questions Raised in This Appeal Are Novel and of Such Wide Public Interest as to Fully Meet the Test of Substantiality 14

Table of Cases.

PAGE

Chicago, M. & St. P. & P. R. Co. v. United States, 33 F. (2d) 583, 587 9

First Los Angeles Depot case, 264 U. S. 331 10

Florida v. United States, 282 U. S. 194, 214-5 13

Interstate Commerce Commission v. Cincinnati, etc. R. Co., 167 U. S. 479, 494 9

LaSalle & B. R. Co. v. C. & N. W. Ry. Co., 13 I. C. C. 610, 613 9

Oregon-Washington case, 288 U. S. 14, 35-40, 36-8 ..... 2, 7, 8, 12

People v. Public Service Commission, 233 N. Y. 113, 135 N. E. 195 6

Second Los Angeles Depot case, 280 U. S. 52, 68-9 11

Texas & Pacific R. Co. v. Gulf, C. & S. F. R. Co., 270 U. S. 266, 278, 276-7 ..... 5, 6, 7, 8

United States v. Idaho, 298 U. S. 105, 107-9 6

Wisconsin R. R. Commission v. C. & N. W. Ry. Co., 187 I. C. C. 195, 198 9

Statutes.

Title 49 U. S. Code, Section 1(18) 6, 7

Title 49 U. S. Code, Section 1(19) 8

Title 49 U. S. Code, Section 1(21) 8, 12

Title 49 U. S. Code, Section 1(22) 4, 5

Title 49 U. S. Code, Section 3(5) 10, 11, 13, 14

Title 49 U. S. Code, Sections 1(10) & 1(11) 12

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1952

CHICAGO AND NORTH WESTERN RAILWAY COMPANY, Appellant, vs. UNITED STATES OF AMERICA, and the INTERSTATE COMMERCE COMMISSION, Appellees.	No. .....

APPELLANT'S BRIEF OPPOSING THE MOTIONS TO AFFIRM.

FOREWORD

This Court's jurisdiction in this appeal is not questioned. Appellees' motion to affirm is made on the sole contention that the questions raised are not substantial (Supreme Court Rule 7, Paragraph 4). Separate formal motions to affirm have been filed by each of three interveners.* Thereby they, in effect, joined in appellees' motion, adopting it by reference (in advance) and setting forth no new matter whatever. Accordingly, refutation of all four motions will be accomplished by directing this brief to the contentions set up by appellees.

* The City of Milwaukee, the Public Service Commission of Wisconsin, and Chicago, Milwaukee, St. Paul and Pacific Railroad Company (referred to as "the Milwaukee") intervened and participated in the trial below.

APPELLEES' CONTENTIONS RESPECTING THE COMMISSION'S POWER UNDER SECTION 1(21) ARE BASED UPON THE FALLACIOUS ASSUMPTION THAT THERE IS BUT ONE INDUSTRIAL DISTRICT WITHIN THE CITY OF MILWAUKEE.

Conceding as they must the authoritative rule of the *Oregon-Washington* case (288 U. S. 14, 35-40), appellees seek to avoid its application here by an assumption that the Jones Island Harbor Terminal is located within a territory which the Milwaukee already holds itself out to serve. They attempt to support this assertion by the simple statement that the Milwaukee's main line reaches and serves the City of Milwaukee and has done so for many years. Since the Harbor Terminal is within the City, *ergo*, the Milwaukee *must* be so holding itself out.

So goes the argument, in direct conflict with appellees' own factual recitals and those in the Commission's reports and in the District Court's findings 1, 2 and 3,* showing that the Milwaukee is shut off completely from the territory within the City which extends along the lake shore and is bounded on the west by the North Western's main line. The City's Jones Island Harbor Terminal, here involved, is located in this lake front territory at the north end of a narrow peninsula which extends up to the harbor entrance. It is served, exclusively, by the North Western.

---

* The important fact that the North Western is the only carrier which has served, or is in a physical position to serve, the Harbor Terminal is shown in these findings. The implication, in court finding 3, that the old Illinois Steel Company property is a part of Jones Island, is incorrect. Finding 3 fails to state the undisputed facts that the Milwaukee's spur never did completely cross the North Western right-of-way and that its right to serve the Steel Company through use of the track which extends part way across that right-of-way terminated when the Steel Company was dismantled in 1938. These findings contain other inaccuracies and extraneous statements as to supposed contract rights, etc., which need not be discussed in this brief, but are contrary to the undisputed evidence.

This situation exists as the natural result of the topography of the area within the City and the relative locations of the two railroad lines. The Milwaukee, paralleling the North Western a half-mile and more to the west, is so located that it cannot reach the lake shore area without extending an existing branch from its main line so that it will cross the main line of the North Western. The objective of the City in proceeding before the Commission was to force the Milwaukee line across the North Western so the Milwaukee could connect with a proposed new track of the City to lead northward to reach and connect with the City's Harbor Terminal trackage on Jones Island. The Milwaukee has never claimed or had such right to cross the North Western or to reach and directly serve the Harbor Terminal.

In such circumstances how can it be said that the Milwaukee has held itself out or undertaken to serve the Harbor Terminal? The implication thrown out by the Commission and picked up by appellees is that since the Milwaukee reaches and serves *some part or parts* of the area within the City, it must follow that it has undertaken to serve *all parts* of the entire City area which covers some 30 square miles. Actually, the City is divided into several distinct territories bounded by important topographical features extending back from the west shore of Lake Michigan. Among these is the Milwaukee River, a large navigable stream which extends westward from the Harbor entrance and turns northward, dividing the City into separate industrial territories. The territory east of that river is served alone by the North Western. That west of the river is served by the Milwaukee. Neither railroad serves both of those territories. Near the Harbor entrance the Kinnickinnic River, also navigable by lake shipping, branches off to the south and west forming the west boundary of "Jones Island," the peninsula at the north end of which the City's

Harbor Terminal is located. Thus Jones Island and the Harbor Terminal are effectively segregated from the mainland on the west. They are accessible by land only from the south through the neck of the peninsula from the lake shore territory exclusively served by the North Western. This is the only rail terminal controlled or operated by the City or by its affiliated Board of Harbor Commissioners; but there are numerous privately owned terminals located in the City in the several other industrial territories.

UPHOLDING THE COMMISSION'S ORDER WOULD DEFEAT THE PURPOSE OF CONGRESS AND WOULD BE CONTRARY TO LEADING DECISIONS OF THIS COURT.

Should appellees' contention be upheld, it would follow that in all industrial cities reached by more than one railroad each railroad would have the right *without any authority from the Commission* to extend its line so as to reach and serve any and all parts of the general territory within the City without any regard for natural barriers, the locations of the lines of competing rail carriers, or the existence of separate industrial districts exclusively built up and served by its competitors. Having established the principle that the entire city was already within the territory of each carrier, all extensions to all parts of the city would have to be regarded as mere "spur, industrial, team, switching or side tracks" within the exception set forth in section 1(22) (49 U. S. C., Sec. 1(22); appellant's Statement as to Jurisdiction, Appendix C, p. 2). This would open up in these industrial cities a period of what might well turn out to be one of intense competitive and retaliatory construction of trackage by the various railroads reaching each city—each railroad striving to reach and serve all of the more important industrial districts. It would strongly promote the uneconomical duplication of railroad facilities

and services and the competitive waste which it is the purpose of Congress to avoid.

In *Texas & Pacific R. Co.* v. *Gulf, C. & S. F. R. Co.*, 270 U. S. 266, the court's opinion, by Mr. Justice Brandeis characterizes the tracks covered by paragraph (22) of section 1, as follows (p. 278):

> "Tracks of that character are commonly constructed either to improve the facilities required by shippers already served by the carrier or to supply the facilities to others, who being within the same territory and similarly situated are entitled to like service from the carrier. The question whether the construction should be allowed or compelled depends largely upon local conditions which the state regulating body is peculiarly fitted to appreciate. Moreover, the expenditure involved is ordinarily small."

Comparing such tracks with line extensions, the opinion proceeds:

> "But where the proposed trackage extends into territory not theretofore served by the carrier, and particularly where it extends into territory already served by another carrier, its purpose and effect are, under the new policy of Congress, of national concern. For invasion through new construction of territory adequately served by another carrier, like the establishment of excessively low rates in order to secure traffic enjoyed by another, may be inimical to the national interest. If the purpose and effect of the new trackage is to extend substantially the line of a carrier into new territory, the proposed trackage constitutes an extension of the railroad within the meaning of Par. 18, *although the line be short, and although the character of the service contemplated be that commonly rendered to industries by means of spurs or industrial tracks.* Being an extension, it cannot be built unless the Federal commission *issues its certificate* that public necessity and convenience require its construction." (Emphasis, ours.)

In that case, one railroad serving the City of Dallas, Texas, was enjoined from extending its line, without prior Commission authority under section 1(18), into an industrial district of that city already exclusively served by another. The effect would have been the same as in the instant case, to enable the first railroad to tap the industrial district, secure a part of the competitive business, and eliminate the division of rates with the second railroad on traffic to and from the industrial district in question. (270 U. S., at pages 276-7.)

It is implied by Appellees that the Oregon-Washington decision is not applicable here because of the much greater length of the extension there involved. As noted above in the quoted passage from the Texas & Pacific opinion, the length of the proposed extension is not at all determinative. If its purpose is to project the carrier's direct service into new territory it is an extension, regardless of its length. The purpose for which the track is to be constructed (here to tap another carrier's territory) is the determining factor. In *People* v. *Public Service Commission,* 233 N. Y. 113, 135 N. E. 195, a piece of track 100 feet long was held not within the exception of paragraph (22). Conversely, it has been held that a branch line 9 miles long, built and maintained to serve a single industry and not involving territory served by another carrier, was a "spur" within the exception of paragraph (22). *United States* v. *Idaho,* 298 U. S. 105, 107-9.

Acceptance of the Commission's ruling here would create a precedent whereunder Commission's control over these highly important railroad extensions would be greatly impaired. Section 1(18) and the *Texas & Pacific* decision would both be set aside and held for naught as to all construction of new railroad lines or extensions within most, if not all, ~~of all~~ industrial cities and communities throughout the land. This would almost completely cir-

cumvent the regulatory scheme provided in paragraphs (18)-(22) of section 1, for it is in these industrial centers that competition for railroad traffic is most keen.

Appellees seek a disregard of the *Texas & Pacific* rule by asserting that in the instant case the Commission *has* passed upon the question of public convenience and necessity. This of course begs the point, which is that, under section 1(21), the Commission would only have power to act if the Milwaukee were already serving Jones Island, the area in which the Harbor Terminal is located. No certificate having been asked for or granted under section 1(18), the rule of the *Texas & Pacific* case has been violated.

Under section 1(18) the Milwaukee alone could have made the application. It has not done so. Different issues, proof, and procedure would have been required had it done so. *Oregon-Washington* case, 288 U. S. 14, 36-8. The issues involved in a determination of the question of public convenience and necessity under section 1(18) have never been before the Commission in this case.

It is important to note at this point that the City attempted, first, to procure an order from the Public Service Commission of Wisconsin (an intervener here) to force this extension. That Commission's conclusions appear in the record here as the City's Exhibit 36 introduced in the Interstate Commerce Commission proceeding. Those conclusions are as follows:

> "1. A Milwaukee Road extension of the Bay View Spur from its present terminus on the right-of-way of the North Western Road across that portion of the right-of-way between the present terminus and the municipal harbor tract, for the purpose of serving the municipal-harbor terminal would require *a certificate of convenience and necessity* from the Interstate Commerce Commission of the United States under the provisions of the Interstate Commerce Act.

2. This Commission has no jurisdiction on the application of the petitioner to order the Milwaukee Road to extend its lines for such a purpose.

3. This Commission has no jurisdiction on the application of the petitioner to order the North Western Road to permit the use of its right-of-way for such a purpose." (Emphasis supplied.)

The City, accepting that decision, sought no appeal in the courts of Wisconsin. These conclusions amount to a holding that the proposed extension would not be a "spur" or other track within that Commission's jurisdiction under paragraph (22) but would come within the Interstate Commerce Commission's jurisdiction under paragraph (18), for it is only under the latter paragraph that a certificate may be issued.

The Wisconsin Commission, in fairness and good conscience, should not now be permitted to dishonor its own decision either by contending that this extension is a spur or that it can be constructed pursuant to paragraph (21) without the prior issuance of a certificate. No more should the City (also an intervener) or the defendants be permitted to do so, in view of the record made by the City, itself, before the defendant Commission.

Under the rule of the *Texas & Pacific* and *Oregon-Washington* cases, the Commission's power with respect to extensions of railroad lines into new territory is permissive only and can be exercised only upon an application under section 1(18) and compliance with the procedures set up in section 1(19).

THE COMMISSION'S LACK OF POWER CANNOT BE CURED BY AGREEMENT OR ACQUIESCENCE OF THE PARTIES.

Appellees also seek to meet the fatal deficiency here by suggesting that any examination of the Commission's lack

of authority to act under section 1(21) should be avoided because the Milwaukee is not objecting to the proposed extension of its line and is willing to comply with the Commission's order. It would be a curious doctrine indeed which would thus, by mere acquiescence of a private party, hold the Commission to be vested with a power which the highest legal authority of the land has already determined was withheld by Congress, viz.: the power to enter a compulsory order for an extension of a line into new territory. Such a specious argument for evading the will of Congress should certainly not be countenanced by either the courts or the Commission itself in view of the long established recognition of the Commission as a body whose powers are strictly limited to those expressly given by statute and not to be enlarged by implication or acquiescence. *Interstate Commerce Commission* v. *Cincinnati, etc. R. Co.*, 167 U. S. 479, 494. *Chicago, M. & St. P. & P. R. Co.* v. *United States*, 33 F. (2d) 583, 587. *La Salle & B. R. Co.* v. *C. & N. W. Ry. Co.*, 13 I. C. C. 610, 613. *Wisconsin R. R. Commission* v. *C. & N. W. Ry. Co.*, 87 I. C. C. 195, 198.

APPELLEES' ATTEMPT TO FIND A BASIS FOR COMMISSION ACTION UNDER SECTION 3(5) IS PALPABLY STRAINED AND FALLACIOUS.

With reference to appellant's proposition that the proposed construction and operation of the Milwaukee's line extension "across the main line tracks and right of way"* of the North Western will not constitute a use of any North Western terminal facility, appellees imply that this is unimportant because such proposed operation would enable the Milwaukee to reach and serve the Harbor Terminal of the City and hence would be "a terminal operation." It is then asserted by appellees that "the proposed

* So stated in the Commission's order. See Paragraph 3 in Exhibit B attached to appellant's Statement as to Jurisdiction.

extension will take place in the very center of the maze of switching operations which make up the terminal of the City of Milwaukee." (Appellees' Motion to Affirm, page 7.)

These assertions indicate a high state of confusion and misunderstanding as to the physical facts, even as they are incompletely and inaccurately stated in the Commission's reports. The proposed extension would end at the east line of the North Western's right of way at a point quite outside of and a considerable distance from the Jones Island Harbor Terminal which is the only existing terminal of the City dealt with in the record or in the Commission's reports. It is that terminal and its facilities the use of which is sought.

The crossing of the North Western's main line tracks and right of way by the Milwaukee's proposed line extension is sought solely as a means to project the Milwaukee's line over to the lake front area from whence it can proceed northward a half mile and more to reach and there operate on the City's terminal trackage. Construction and operation of this proposed extension would constitute no use of terminal trackage or other terminal facilities of any description of the North Western. It would effectuate nothing more nor less than a crossing of the North Western's "main line tracks and right of way." The mere reference to this in the Commission's order as a use of North Western terminal facilities (paragraphs 3 and 5) does not make it so. Appellees now refer to this administrative fiat as an expert determination and imply that this Court may not inquire into its nature or take any action to correct it. They forget that primary objectives of judicial review of administrative orders are to make sure that administrative agencies do not exceed the powers granted to them by Congress and that in the exercise of granted powers they do so in a manner consistent with the constitutional guaranties.

Quotations from the first *Los Angeles Depot* case (264 U. S. 331) and the Commission's general decision regarding consolidation of railroads (159 I. C. C. 522-3) do not reach the point here involved. No amount of liberal construction can inject into section 3(5) a power to appropriate a part of one railway company's main line right-of-way for the purpose of providing a crossing of that main line by an extension of another competing railroad. As aptly stated in the second *Los Angeles Depot* case (280 U. S. 52, 68-9), a "more specific and express power than is found in the act" would be required for such purpose. And, as the Commission itself has said (p. 198):

> "In the absence of specific language only the most unmistakable evidence of an intention to confer upon us power to act under given circumstances would warrant the assumption of such power through our own construction of the act." Wisconsin R. R. Commission, 87 I. C. C. at p. 198.

THE LACK OF ESSENTIAL BASIC FINDINGS IS EMPHASIZED BY APPELLEES' MOTION.

On page 4 of appellees' motion to affirm the three quotations from the Commission's reports apparently cover the only portions of those reports which are deemed by appellees to be in the nature of factual findings. In paragraph 3 on page 8, appellees refer to these as "basic findings."

The first quotation is a simple conclusion that delays termed "serious" involved in the present joint-line switching service to the Harbor Terminal would be avoided if the proposed extension and switching connection were made; and that direct access of the Milwaukee is "necessary in the development of the harbor area." The reference to delays is carefully worded to avoid the need for reference to the other readily available means to eliminate

delays, viz.: through changing the present method of switching to require the Milwaukee to receive the interchange of cars from the North Western at Washington Street within an hour's time. Delays in switching service are commonly cured by means other than building railroad extensions. Section 1(11)* gives the Commission broad powers to enforce adequate car service practices (such as this switching in interchange service) which reasonably should be explored and exhausted before resort is had to the more drastic remedy of compulsory line extension under section 1(21).

This lonely finding regarding delays, we submit, does not supply the "basic and essential" facts to support an ultimate conclusion of public necessity. Furthermore the necessity referred to here is future in nature because it refers to the development of the harbor area and the preceding recitations in the Commission's first report show that the development in the past 20 years to the present time, under exclusive North Western service, has been truly remarkable (279 I. C. C. at p. 530). Future convenience and necessity cannot be considered by the Commission under Section 1(21) (*Oregon-Washington* case, 288 U. S. 14, 36-8). These findings fall short of what is

---

* Paragraphs 1(10) and 1(11) read as follows (49 U.S.C. § 1(10) and (11):

"(10) The term 'car service' in this part shall include the use, control, supply, movement, distribution, exchange, interchange, and return of locomotives, cars, and other vehicles used in the transportation of property, including special types of equipment, and the supply of trains, by any carrier by railroad subject to this part.

"(11) It shall be the duty of every carrier by railroad subject to this part to furnish safe and adequate car service and to establish, observe, and enforce just and reasonable rules, regulations, and practices with respect to car service; and every unjust and unreasonable rule, regulation, and practice with respect to car service is prohibited and declared to be unlawful."

required to support the ultimate general finding under that section.

An even greater lack of essential basic findings under Section 3(5) is not given any consideration in appellees' motion. The second and third quoted passages on page 4 of appellees' motion are mere general or ultimate conclusions, which, standing alone, as they do, have no support by way of basic findings of fact so often found by this court to be essential. (See *Florida v. United States*, 282 U. S. 194, 214-5, and the other cases cited on page 8 of appellant's Statement as to Jurisdiction.) The second quotation makes reference to a "switch connection between the extension of the Milwaukee and the municipal harbor tracks" and contains the ultimate findings in the language of section 1(9). In its second report the Commission disclaimed and repudiated this attempt to exercise power under that section (383 I. C. C. at pp. 313-4).

Switching then to paragraph (5) of section 3 (49 U. S. C. §3(5)) the Commission, in the second report, came up with the astounding conclusion that the extension of the Milwaukee's line across the North Western's main line tracks and right-of-way was a use of a North Western "terminal facility"—a conclusion directly at odds with the inescapable physical facts and undeniable purpose and effect of the Commission's order (Ex. B, par. 3, Appellant's Statement as to Jurisdiction).

It is respectfully submitted that such verbal legerdemain is no substitute for basic findings of fact, quasi-jurisdictional in nature, which would lay a basis for Commission action under section 3(5). Such findings obviously were not made because no essential fact exists which would show that a use of any terminal facility of the North Western is involved.

THE QUESTIONS RAISED IN THIS APPEAL ARE NOVEL AND OF SUCH WIDE PUBLIC INTEREST AS TO FULLY MEET THE TEST OF SUBSTANTIALITY.

The Commission's theory that it has power to compel an extension of a railroad line to any industrial district within a city by any railroad which reaches the city is novel. So far as we are advised it has never been put forth before. Certainly it has never been passed upon by any court.

Likewise, the Commission's theory that it has power to force a line extension by one railroad across a competing railroad's main line, appropriating a part of the latter's right of way; and that this will constitute a use of one of the latter's terminal facilities, is novel. This obviously strained construction of section 3(5) has not been put forth before.

The wide public interest in these questions and in the further questions raised by our assignment of errors is set out on pages 12-16 of our Statement as to Jurisdiction and will not be repeated here. It has not been questioned, in any of the motions to affirm, that these questions are of wide public interest and concern as we have stated.

We respectfully sumbit that these questions are so substantial as to merit full consideration and review by this Court.

Respectfully submitted,

NYE F. MOREHOUSE,

P. F. GAULT,

EDGAR VANNEMAN,
Attorneys for Appellant.

400 W. Madison Street,
Room 1422,
Chicago 6, Illinois.

CERTIFICATE OF SERVICE

I hereby certify that on this 24th day of September, 1952, I caused copies of the foregoing brief to be served by mail on counsel for all parties of record.

NYE F. MOREHOUSE,
Attorney for Appellant.